Supreme Court, U.S.
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No. 97-214

In The

Supreme Court of the United States

October Term, 1996

DONALD R. KURZ, *et al.*,

Petitioners,

v.

PHILADELPHIA ELECTRIC COMPANY, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

Respondents in this matter are PECO Energy Company, formerly known as Philadelphia Electric Company, Service Annuity Plan of Philadelphia Electric Company, Charles L. Fritz, J.L. Everett, III and John H. Austin, Jr.

Respondents have no parent companies or non-wholly owned subsidiaries to list pursuant to Rule 29.6.

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BRIEF IN OPPOSITION

Respondents PECO Energy Company, *et al.*, (collectively, "PECO") respectfully pray that the petition for writ of certiorari sought in this matter be denied.

STATEMENT OF THE CASE

This is the second of two consolidated cases filed in the United States District Court for the Eastern District of Pennsylvania alleging that PECO was liable under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1001, *et seq.*, for affirmatively misleading employees concerning whether PECO was contemplating changes to certain of its ERISA plans.

In this case, employees who decided to retire before PECO changed its pension plan to provide more lucrative benefits claimed that PECO violated ERISA when it failed to inform them that such changes were being contemplated. In the earlier of the two cases, known as the *Fischer* case, employees who decided to retire before PECO offered certain early retirement incentives claimed that PECO violated ERISA when it failed to inform them that such incentives were being contemplated. *See Fischer* v. *Philadelphia Elec. Co.*, 96 F.3d 1533 (CA3 1996), *cert. denied*, 117 S. Ct. 1247 (1997).

Petitioners correctly note at the outset of their Petition for Writ of Certiorari, *see* Pet. for Cert. at 1 n.1, that the first question presented for review here is identical to the question that this Court refused to review earlier this year when the Court denied certiorari in *Fischer*, 117 S.

Ct. 1247 (1997). In this case, review should again be denied.

The Third Circuit's Decision Rests on Alternate Grounds

The Third Circuit's decision in this matter rests on alternate grounds, the second of which is unworthy of review and presents an adequate and independent basis for the Third Circuit's ruling in PECO's favor.

As the first basis for its ruling, the Third Circuit held that ERISA imposed no duty on a company to inform an employee concerning whether changes could occur to the company's ERISA plans until the changes were the subject of "serious consideration." App. to Pet. for Cert. 11a. Because some plaintiffs retired after the date on which the Third Circuit held that possible pension plan changes began to receive "serious consideration," the court of appeals proceeded to determine whether ERISA's statute of limitations barred the class members' claims. *Id.*

As the alternate ground for its holding, the Third Circuit ruled that because "all the material elements of a breach of fiduciary duty claim were patently obvious on July 2, 1987, the day PECO announced the pension increase," App. to Pet. for Cert. 13a, and "[b]ecause no fraud or concealment of any kind occurred," *id.* at 15a n.5, ERISA's three-year statute of limitations applied to the claims of the plaintiff class, *id.* at 15a. Since this action was not filed until April 30, 1991, more than three years after the ERISA claims of the plaintiff class accrued, the Third Circuit held as an alternate basis for its judgment in PECO's favor that the claims of the plaintiff class were

time-barred. The Third Circuit's ruling on the statute of limitations issue constitutes an adequate and independent basis for the Third Circuit's judgment in PECO's favor on the ERISA claims of the plaintiff class.

Even if this Court were now willing to review the issue as to which it recently denied certiorari in *Fischer*, the Third Circuit's decision that the claims of the plaintiff class were time-barred is plainly not deserving of this Court's review. Accordingly, this Court should deny the Petition for Writ of Certiorari.

Factual and Procedural Background

PECO, since 1977, has conducted regular periodic reviews of its pension fund programs. Part of that review involves comparing the benefits that PECO offers its employees to the benefits that other similar companies offer their employees. The event that gives rise to this suit was PECO's announcement on July 2, 1987 of a plan to provide more lucrative pension benefits to its employees as of August 1, 1987.

The plaintiff class consists of various former PECO employees who retired between February 1, 1987 and July 1, 1987. The plaintiff class alleged that ERISA imposed a duty on PECO to inform plaintiffs before July 2, 1987 that pension plan changes might occur. The plaintiff class further alleged that if PECO had provided such information, the class members would have postponed retirement until after the pension plan changes took effect.

The district court concluded that PECO began seriously considering an increase in pension benefits as of

March 1, 1987. Accordingly, the district court entered judgment in favor of all members of the plaintiff class who asked about pension benefits after March 1, 1987. App. to Pet. for Cert. 7a. The district court also concluded that it was appropriate to apply ERISA's alternative six-year statute of limitations, because, in the district court's view, "[t]he class action complaint clearly sounds in concealment." App. to Pet. for Cert. 65a-66a (conclusions of law 22-25).

PECO thereafter appealed to the United States Court of Appeals for the Third Circuit. The Third Circuit reversed both aspects of the district court's decision. First, the court of appeals ruled, based on its review of the evidence of record, that PECO did not begin to give serious consideration to the pension plan changes that are the subject of this suit until May 28, 1987. App. to Pet. for Cert. 7a-11a. As previously noted, however, the plaintiff class included PECO employees who had retired between February 1, 1987 and July 1, 1987. The claims of some plaintiffs therefore survived the Third Circuit's ruling on the issue of serious consideration.

The Third Circuit turned next to examine the question whether the ERISA claims of the plaintiff class were time-barred. The Third Circuit ruled that the plaintiff class's claims under ERISA accrued on July 2, 1987: "In the current case, all the material elements of a breach of fiduciary duty claim were patently obvious on July 2, 1987, the day PECO announced the pension increase." App. to Pet. for Cert. 13a. That date was more than three and one-half years prior to the filing of this lawsuit.

Examining the facts of record, the Third Circuit concluded, notwithstanding that plaintiffs had claimed concealment, that it could "find nothing suggesting that fraud or concealment delayed the discovery of the breach of fiduciary duty claim." App. to Pet. for Cert. 15a. Indeed, the court of appeals determined, based on its review of the record, that "no fraud or concealment of any kind occurred." App. to Pet. for Cert. 15 n.5.

Accordingly, the Third Circuit ruled that ERISA's three-year statute of limitations, which applies where a plaintiff has actual knowledge of his or her claim, and not ERISA's six-year statute of limitations, governed the claims of the plaintiff class. App. to Pet. for Cert. 15a. Given that (1) a three-year statute of limitations governed the claims of the plaintiff class, (2) the plaintiff class knew of its ERISA claims as of July 2, 1987, and (3) the plaintiff class did not initiate this suit until April 30, 1991, the Third Circuit ruled that all plaintiffs' claims were time-barred. App. to Pet. for Cert. 11a-15a.[1]

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[1] The Third Circuit's precise holding on the statute of limitations issue was: "We therefore hold that §413's statute of limitations bars the fiduciary duty claims of those members of the plaintiff class who asked about a change in pension benefits and retired after May 28, 1987 [the date on which serious consideration was found to have commenced] but before July 2, 1987." App. to Pet. for Cert. 15a. Nevertheless, it is plain that the Third Circuit's statute of limitations ruling constitutes an alternate ground for the dismissal of plaintiffs' entire suit. Moreover, the Third Circuit's conclusion that "no fraud or concealment of any kind occurred," App. to Pet. for Cert. 15 n.5, was not limited to those class members who retired between May 28, 1987 and July 1, 1987. Rather, that conclusion plainly applied to all members of the plaintiff class.

The Third Circuit issued its rulings in this case and in the *Fischer* case on October 1, 1996. In the *Fischer* case, plaintiffs filed a Petition for Writ of Certiorari on December 24, 1996 presenting a single question for review, which was identical to the first question presented for review in this case. On March 17, 1997, this Court denied the Petition for Writ of Certiorari filed in the *Fischer* case. *See* 117 S. Ct. 1247 (1997).

In the instant case, plaintiffs filed a petition for panel rehearing asserting that the panel misapprehended facts pertaining to three individual class members. On May 7, 1997, the Third Circuit denied the petition for panel rehearing. App. to Pet. for Cert. 144a-46a.[2] Thereafter, plaintiffs filed the Petition for Writ of Certiorari that is the subject of this Brief in Opposition.

ARGUMENT

This Court Should Deny Certiorari Because The Second Ground On Which The Third Circuit's Judgment Rests Is An Adequate And Independent Ground On Which To Sustain The Judgment And Is Clearly Unworthy Of Review

I. This is an inappropriate case in which to resolve any conflict created by the Second Circuit's recent decision in *Ballone*

The Third Circuit's ruling in PECO's favor rests on alternate grounds. The second ground, holding the ERISA

[2] As reproduced in the Appendix to the Petition for Writ of Certiorari, the order denying the petition for panel rehearing bears the erroneous date of May 7, 1977. *See* App. to Pet. for Cert. 146a.

claims of the plaintiff class to be time-barred, constitutes an adequate and independent basis for the court of appeals' ruling. The court of appeals' decision on the statute of limitations question is plainly undeserving of this Court's review. Accordingly, while the first question presented arguably now is the subject of a circuit conflict, this is not the appropriate case in which to resolve the conflict, because no matter how the conflict is resolved the judgment in PECO's favor would stand.

On March 21, 1997, four days after this Court denied the Petition for Writ of Certiorari filed in the *Fischer* case, the United States Court of Appeals for the Second Circuit issued its decision in *Ballone* v. *Eastman Kodak Co.*, 109 F.3d 117. In *Ballone*, the Second Circuit held that an employer could be held liable for making affirmative misrepresentations concerning whether pension plan changes were under review even before such changes were the subject of "serious consideration." *Id.* at 122-25.

In so holding, the Second Circuit appears to have disagreed with the rulings of other courts of appeals that have refused to impose ERISA liability on an employer in similar circumstances until after pension plan changes become the subject of "serious consideration." *See, e.g.*, *Fischer* v. *Philadelphia Elec. Co.*, 96 F.3d 1533, 1539 (CA3 1996), *cert. denied*, 117 S. Ct. 1247 (1997); *Berlin* v. *Michigan Bell Tel. Co.*, 858 F.2d 1154, 1163-64 (CA6 1988); *Wilson* v. *Southwestern Bell Tel. Co.*, 55 F.3d 399, 405 (CA8 1995); *Maez* v. *Mountain States Tel. & Tel., Inc.*, 54 F.3d 1488, 1500-01 (CA10 1995); *Barnes* v. *Lacy*, 927 F.2d 539, 544 (CA11), *cert. denied*, 502 U.S. 938 (1991).

Even if this Court were disposed to resolve without further percolation among the courts of appeals the apparent conflict created by the Second Circuit's recent ruling in *Ballone*, this case is not the appropriate vehicle.

No matter how this Court might resolve the apparent conflict between *Ballone* and the Third Circuit's ruling in this case, the judgment against plaintiffs would stand because of the Third Circuit's separate ruling on the statute of limitations question. Given this Court's practice of resolving circuit conflicts only in cases where resolution of the conflict could affect the result of the case, this Court should deny the Petition for Writ of Certiorari. The Court could of course later grant review in a case in which resolution of the conflict that *Ballone* appears to create could benefit the party seeking review, and after other circuits have had an opportunity to consider the Second Circuit's recent ruling.[3]

II. There is no reason for this Court to review the Third Circuit's statute of limitations ruling

Petitioners make a half-hearted attempt to argue that the Third Circuit's resolution of the statute of limitations

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[3] Except for noting the existence of the Second Circuit's ruling in *Ballone*, the Petition essentially repeats the very same arguments for granting review of the first question presented that this Court rejected in *Fischer*. Because PECO fully addressed those arguments in its Brief in Opposition filed in *Fischer*, No. 96-1038, and because this Court denied review in *Fischer* on March 17 of this year, PECO has limited its argument herein on the first question presented to whether this Court should grant review in light of *Ballone*.

question is worthy of this Court's review, but petitioners' effort in that regard is unpersuasive.

Dedicating just a little more than a page of their Petition to this issue, *see* Pet. for Cert. 25-26, petitioners begin by asserting that "the Third Circuit's decision regarding the applicable statute of limitations conflicts with decisions of other courts of appeals." *Id.* at 25. The discussion that follows, however, recognizes that the Third Circuit's statute of limitations ruling is in accord with the rulings of five circuits and is allegedly contrary only to the decision of a *single* court of appeals – and even that asserted conflict disappears upon analysis of the latter decision.

The Petition erroneously asserts that the Third Circuit's statute of limitations holding conflicts with the Second Circuit's ruling in *Diduck* v. *Kaszycki & Sons Contractors, Inc.*, 874 F.2d 912 (1989), that "[f]or a breach of fiduciary duty involving fraud or concealment, the three-year exception for actual knowledge does not apply, and a party has six years from the time it discovers the breach to bring an action." Pet. for Cert. 26 (quoting *Diduck*, 874 F.2d at 919).

The holding of *Diduck* on which petitioners rely could only give rise to a circuit conflict if the present case had been found to have "involv[ed] fraud or concealment . . . ," *id.*, but the Third Circuit had nevertheless applied the shorter limitations period. However, the Third Circuit expressly found in the context of its statute of limitations discussion that "no fraud or concealment of any kind occurred" in this case. App. to Pet. for Cert. 15a n.5. There is, accordingly, no conflict between the Third

Circuit's holding in this case, in which no fraud or concealment occurred, and the Second Circuit's holding in *Diduck*, where the plaintiffs produced sufficient evidence of fraud and concealment.

Because the Third Circuit's ruling on the statute of limitations issue – holding the ERISA claims of the plaintiff class to be time-barred under ERISA's three-year statute of limitations – constitutes an adequate and independent ground for the Third Circuit's ruling, and because the Third Circuit's ruling on the statute of limitations issue is not deserving of this Court's review, the Petition for Writ of Certiorari should be denied.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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